

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
CONDITIONAL USE AND VARIANCE
PERMIT ISSUED BY YAKIMA COUNTY
TO WHISTLIN' JACK LODGE, INC.,
AND APPROVED BY STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

LANCE STEPHENS, RICHARD
STEPHENS, and MAURICE MEILLEUR,

Appellants,

v.

YAKIMA COUNTY, STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY, and WHISTLIN' JACK
LODGE, INC.,

Respondents.

SHB No. 84-35

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of a shoreline substantial development, conditional use and variance approval for a two-story, eight-unit motel addition to Whistlin' Jack Lodge on the Naches River came on for hearing before the Shorelines Hearings Board; Lawrence J. Faulk,

1 presiding, Gayle Rothrock, Wick Dufford, Rodney M. Kerslake, and Nancy
2 R. Burnett, Members, on April 17 and 18, 1985, in Yakima, Washington.
3 The proceedings were officially reported by Bibi Carter and Lynette
4 Walters. The Board viewed the site during the first day of the
5 hearing.

6 Appellants were represented by their attorney Douglas D. Peters.
7 Respondent Yakima County was represented by Deputy Prosecuting
8 Attorney Terry Austin. Respondent Department of Ecology was
9 represented by Assistant Attorney General Jay J. Manning. Respondent
10 Whistlin' Jack Lodge, Inc., was represented by Attorney Scott L.
11 Schmidtman.

12 Witnesses were sworn and testified. Exhibits were admitted and
13 reviewed and oral argument was heard. From the testimony, evidence
14 and argument, the Board makes these

15 FINDINGS OF FACT

16 I

17 The proposed development is situated within the wetlands of the
18 Naches River, a shoreline of statewide significance and a Conservancy
19 environment as classified by the Yakima County Shoreline Master
20 Program (YCSMP).

21 The proposal includes the removal of an existing cottage and the
22 construction of an eight-unit apartment. Eight additional gravel
23 parking spaces and a new septic tank and drain field will be provided
24 upland from the proposed structure. The proposed structure consists
25 of two stories with four units on each story.

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1 Some of the existing commercial development of the surrounding
2 property pre-dates the Shoreline Management Act and some improvements
3 have been added since the Act and the development of the YCSMP.

4 II

5 Appellants seek disapproval from the Shorelines Hearings Board of
6 a shoreline substantial development, conditional use and variance
7 permit granted by Yakima County and the Department of Ecology for the
8 project described in Finding of Fact I.

9 III

10 Respondent Whistlin' Jack Lodge, Inc., resort currently consists
11 of fourteen lodging units (eight of which are situated in a two-story
12 building) a restaurant, gift shop, recreational vehicle spaces (10)
13 and related parking and accessory uses, store, and gasoline and
14 propane station, all located adjacent to SR Highway 410 on Chinook
15 Pass. The Whistlin' Jack development has been in existence since
16 approximately 1925.

17 The subject project was granted a variance by Yakima County and
18 Department of Ecology (DOE) from the normal 100-foot structural
19 setback from the ordinary high water mark of the Naches River,
20 allowing the proposed complex to be situated approximately 35 feet
21 from the ordinary high water mark. This placement is in the vicinity
22 of an old cottage which was relocated. Two other nearby cottages on
23 the Whistlin' Jack property are located within 100 feet of the
24 ordinary high water mark: One within 50 feet; the other one 70 feet.
25 The elevation of the proposed construction is approximately 8 vertical

1 feet above the ordinary high water mark.

2 IV

3 Appellants own small, rustic cabins located on down-river parcels
4 of property which they lease from the U.S. Forest Service. The
5 appellants' cabins are not permanent year around residences, but
6 recreational facilities for weekend and vacation use. Two of
7 appellants' cabins are located inside the 100-foot setback. Stephens'
8 cabin is approximately 70 feet from the ordinary high water mark and
9 the Meilleur cabin is approximately 50 feet from the mark. Appellants
10 contend that the proposed construction will substantially impair their
11 riverfront view, and will encourage increased use of the shoreline.
12 They are concerned with change in the quiet uncrowded character of the
13 neighborhood by increased commercial development nearby.

14 The U.S. Forest Service does not oppose the proposed construction
15 at Whistlin' Jack's.

16 V

17 On March 30, 1984, respondent Whistlin' Jack Lodge, Inc., applied
18 for a substantial development, conditional use and variance permit for
19 the subject proposal.

20 VI

21 On April 10, 1984, notices of the application were mailed to all
22 property owners of record within a radius of 300 feet of the subject
23 property. The appellants did not learn of the proposal until it had
24 been approved by Yakima County. The County, as as part of its
25 required public notice, notified the U.S. Forest Service, the fee

1 title owner to the property. The appellants' ownership of cabins on
2 U.S. Forest Service property does not appear in the property records
3 of Yakima County.

4 VII

5 On April 13, and 16, 1984, the notice of application was published
6 and comment was invited in the Yakima Herald Republic newspaper in
7 accordance with provisions in the SMA and the YCSMP.

8 VIII

9 On April 25, 1984, a final declaration of non-significance was
10 issued by Yakima County, after evaluating the comments received and
11 the facts at hand.

12 IX

13 Thereafter, on May 17, 1984, Yakima County granted a shoreline
14 management substantial development, conditional use and variance
15 permit to respondent Whistlin' Jack Lodge, Inc.

16 X

17 On June 22, 1984, the DOE approved the conditional use and
18 variance permits.

19 XI

20 Feeling aggrieved by the DOE decision, the appellants requested
21 review by this Board on July 20, 1984. On July 27, 1984, the request
22 for review was certified by the Department of Ecology. The parties
23 held numerous discussions in an attempt to settle this dispute. A
24 pre-hearing conference was held on December 11, 1984, in Yakima.

XII

Testimony about a septic system failure at the resort in the past related to a wholly different drainfield from that planned for the proposed motel addition. Even were this unit to be relocated, the evidence was that domestic waste disposal problems can and will be solved.

XIII

No significant flood hazard from use of the proposed site for the development in question was shown.

XIV

The project is an expansion of an existing water-oriented commercial use in one of the few privately held areas along the Naches River where such uses can be undertaken. It would increase public access to the shoreline.

Such expansion would not, however, alter the mix of uses in the neighborhood, nor would it substantially alter the character of the neighborhood. Overall development of the entire Whistlin' Jack tract would not exceed the low intensity level.

XV

The project would not significantly impair scenic views. Considerable natural vegetation would continue to exist between the proposed project and appellants' cabins.

XVI

No evidence established that more than a moderate effect on the quality of the environment is a reasonable probability from building

1 and operating the proposal.

2 XVII

3 Any Conclusion of Law which is deemed a Finding of Fact is hereby
4 adopted by such.

5 From these Findings of Fact the Board comes to these

6 CONCLUSIONS OF LAW

7 I

8 The Shorelines Hearings Board reviews applications for shoreline
9 permits de novo, conscious, of course, that the burden of proof in
10 this case is on the appellants. The questions to be decided by this
11 Board are; (a) Did approval of the proposed project comply with the
12 procedural requirements of the State Environmental Policy Act (SEPA);
13 and (b) Is the proposed project consistent with the Shoreline
14 Management Act (SMA) and the Yakima County Shoreline Master Program
15 (YCSMP), including the variance and conditional use criteria adopted
16 pursuant thereto?

17 II

18 Based on Finding XVI above, the County was justified in issuing a
19 final declaration of non-significance. ASARCO v. Air Quality
20 Coalition, 92 Wn.2d 685, 601 P.2d 501 (1979). Accordingly, we
21 conclude there was no violation of SEPA.

22 III

23 The major policy considerations of the SMA of 1971 are set forth
24 in RCW 90.58.020. Two major policy considerations are set forth in
25 different portions of this section of the statute, as follows:

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It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

✱ ✱ ✱

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

IV

The SMA does not require that there be a compensating public benefit to offset the private benefits from every development permit which is issued, but simply requires that the public interest be considered in the processing of permits for any shoreline development. Portage Bay-Roanoke Park Community Council v. The Shorelines Hearings Board, 92 Wn.2d 1, 593 P.2d 151 (1979). In that case, the Washington Supreme Court upheld a decision by the Shorelines Hearings Board allowing the issuance of a permit for a floating walkway and services facility for eight houseboats.

The proposed project does minimum damage to the ecology or environment of the subject shoreline area, and enhances the public's use of the Naches River or its riverfront.

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1 We conclude that general policies of the SMA would not be
2 violated. Moreover, we have taken into account the special
3 preferences for shorelines of statewide significance set forth in RCW
4 90.58.020, and decide that this proposal is consistent with the intent
5 of that listing. In this regard, we are particularly influenced by
6 the positive impacts of this project on public access.

7 V

8 YCSMP Section 15.07.030 deals with commercial development in Rural
9 and Conservancy environments. It states:

10 The following Commercial activities are permitted in
11 the Rural and Conservancy Environments provided that
12 development is of low intensity and collective
development will not substantially alter the existing
character of the area and further provided that:

- 13 1. A 100 foot setback is maintained between any
14 non-water dependent structure and the ordinary
high water mark of any stream or lake.

15 15.07.031 By Conditional Use Permit: Water
16 dependent and water-oriented commercial uses.

17 The proposed development, as a low-intensity water-oriented
18 commercial use is, thus, consistent with the YCSMP Conservancy
19 environment, if a variance from the setback is obtainable and if
20 conditional use criteria can be met.

21 However, the Board is concerned that the general level of site
22 development at the resort is approaching the threshold beyond which it
23 could no longer be characterized as low intensity. Any future
24 expansion will have to be closely scrutinized if the "intensity"
25 criterion of the master program is to retain its ordinary meaning.

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VI

Section 18.00 of the YCSMP entitled "Conditional Uses" states:

Conditional uses are those uses which may be permitted to be located in shoreline areas, but are usually seen as uses which either do not need, or depending on the environment, considered not to be suitable for siting in shoreline locations. It is understood, however, that there may be special circumstances or a special type or style of conditional use that would make shoreline siting of special cases acceptable to the goals, policies and intentions of this Master Program.

Section 18.04 of the YCSMP states:

The applicant must supply evidence or information demonstrating to the satisfaction of the Administrator or the Legislative Body that all of the following criteria will be met;

- a) That the proposed use will be consistent with the policies of RCW 90.58.020.
- b) That the proposed use is consistent with the specific policies and their underlying element goals which pertain to the particular type of project as indicated in chapter 4 of this Master Program. If conflicting element goals are identified as applicable under applicable policies, such element goals shall be balanced in order to achieve the most overall consistency with the long range goals identified in Chapter 3 of the Master Program and the overall general public interest in the shorelines.
- c) That the proposed use will not interfere with the normal public use of public shorelines.
- d) That the proposed use of the site and design of the project will be compatible with other permitted uses within the area.
- e) That the proposed use will cause no unreasonably adverse effects to the shoreline environment designation in which it is located.
- f) That the public interest suffers no substantial detrimental effect.

1 Section 18.05 of the YCSMP States:

2 Failure to satisfy any one of the provisions of
3 Section 18.04 shall result in denial of the
4 conditional use.

4 VII

5 As noted in Conclusion IV, the proposed project is consistent with
6 the policies of the SMA. Therefore, it is consistent with the
7 requirements of YCMP Section 18.04(a). Further we see no
8 inconsistency with the policies and goals of Chapter 4 of YCSMP and
9 conclude that Section 18.04(b) is satisfied.

10 The requirements of YCMSP Section 18.04(c) and (d) are met in that
11 the proposed use will not interfere with normal public use of public
12 shorelines as it does not block access to the beach. Further, the
13 project is compatible with other permitted uses within the area since
14 the subject property is already devoted to Whistlin' Jack Lodge, Inc.,
15 which has existed for over 50 years in that location. The use of the
16 shoreline by persons staying in the new units will be passive,
17 identical to the use of the shoreline by the appellants from their
18 respective nearby cabins.

19 The requirements of Subsections (e) and (f) are met in that no
20 unreasonably adverse effects to the shoreline environment would be
21 caused by the development and the public interest will suffer no
22 substantial detrimental effect. As stressed above, the existing use
23 of the subject property is being expanded to replace an old cottage
24 with an eight-unit facility as part of an existing permitted use,
25 namely a resort. In fact, the public interest will be enhanced as

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1 guests staying in the new units will be enabled to enjoy the scenery
2 of the Naches River shoreline.

3 Thus, the Board believes the requirements of YCSMP Section 18.04
4 regarding conditional uses have been satisfied.

5 VIII

6 Section 20.00 of the YCSMP entitled "variance" states:

7 A variance may be authorized relating to specific
8 bulk, dimensional, or performance standards set forth
9 in these regulations where there are extraordinary or
10 unique circumstances relating to the property such
11 that strict implementation of these regulations would
12 result in undue hardship.

13 Section 20.04 of the YCSMP states:

14 The applicant shall submit information or evidence
15 demonstrating to the satisfaction of the
16 Administrator or the Legislative Body that all of the
17 criteria below will be met:

- 18 a) That the variance requested will be in harmony
19 with the general purpose and intent of the
20 Master Program.
- 21 b) That the strict application of the bulk,
22 dimensional, or performance standards set forth
23 in the Master Program precludes or significantly
24 interferes with a reasonable permitted use of
25 the property.
- 26 c) That the hardship described in Section b above
27 is specifically related to the property, and is
a result of unique conditions such as irregular
lot shape, size, or natural features and the
application of the Master Program and not, for
example, from deed restrictions or the
applicant's own actions.
- d) That the design of the project will be
compatible with other permitted activities in
the area and will not cause adverse effects to
adjacent properties or the shoreline environment
designation.

- 1 e) That the requested variance will not constitute
2 a grant of special privilege not enjoyed by
3 other properties in the area and will be the
4 minimum necessary to afford relief.
- 5 f) That the public interest will suffer no
6 substantial detrimental effect.
- 7 g) That the public rights of navigation and use of
8 shorelines will not be adversely affected by the
9 granting of the variance.

10 Section 20.05 of the YCSMP states:

11 Failure to satisfy any one of the criteria
12 established in Section 20.04 shall result in denial
13 of the variance.¹

14 IX

15 The first requirement of the variance criteria (a) is met because
16 the project is allowed by the YCSMP in a Conservancy environment and
17 will provide the public with increased access to the Naches River.
18 There is a path along the riverbank that is anywhere from ten feet to
19 twenty feet wide that the public has consistently utilized over the
20 years. This proposed development will not impinge on that strip of
21 land. In fact, all of the neighboring land, with the exception of the
22 land appellants' cabins occupy, is public land and thus the citizens
23 have a right to use that land to enjoy the river.

-
- 24 1. The DOE WAC 173-14-155 declares that the local government and
25 Department may apply the more restrictive criteria as between WAC
26 173-14-150 and the local shoreline master program. The parties
27 have not brought to our attention nor does it appear there is any
difference between the YCSMP and the WAC. Therefore, the Board
applies the criteria of the master program.

X

The second requirement (b) that having to do with a "reasonable permitted use of the property" is more difficult to decide. However, on balance the Board believes that appellant presently has a reasonable use of his property without allowing him to build this project in the 100 foot setback. Therefore, this provision of the variance criteria is not met. Therefore, the variance must be denied.

XI

The third requirement of the variance criteria (c) is not met because the Board believes the hardship is the result of the applicant's own decisions. While the proposed location of the proposed project closer to the river is a more desirable location from the applicant's standpoint, the Board is not convinced that this is the only reasonable location on the property where such development can occur.

XII

In the Board's view, Items (d), (e), (f), and (g) of the variance criteria were met.

XIII

RCW 90.58.140(4) of the Shoreline Management Act (SMA) deals with notice requirements. It provides in pertinent part:

(4) Local governments shall require notification of the public of all applications for permits governed by any permit system established pursuant to subsection (3) of this Section by ensuring that:

a) A notice of such an application is published at least once a week on the same day of the week for two consecutive weeks in a legal newspaper

1 of general circulation within the area in which
2 the development is proposed; and

3 b) Additional notice of such an application is
4 given by at least one of the following methods:

5 1) Mailing of the notice to the latest recorded
6 real property owners as shown by the records
7 of the county assessor within at least 300
8 feet of the boundary of the property upon
9 which the substantial development is
10 proposed; ...

11 Yakima County selected the mailing option set forth in (4)(b)(1).

12 The Board finds that proper notice requirements were met. We are
13 sympathetic to the fact that the appellants did not receive notice.
14 This occurred because they lease land from the U.S. Forest Service and
15 thus are not registered landowners. It would have been appropriate
16 for the County to have taken steps to notify the appellants even
17 though it was not legally necessary. In any event, the lack of notice
18 to the appellants is not fatal to this application.

19 XIV

20 All YCSMP variance and conditional use criteria must be met before
21 a variance or conditional use permit may be granted. Appellants have
22 failed to show that the subject project does not meet all the
23 conditional use criteria. However, appellants did show that the
24 subject project does not meet (c) and (d) of the variance criteria.
25 Accordingly, Yakima County's granting of the substantial development
26 and conditional use permit should be affirmed while the Yakima
27 County's granting of the variance should be denied.

XV

We have considered the other issues and find they are without merit.

XVI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

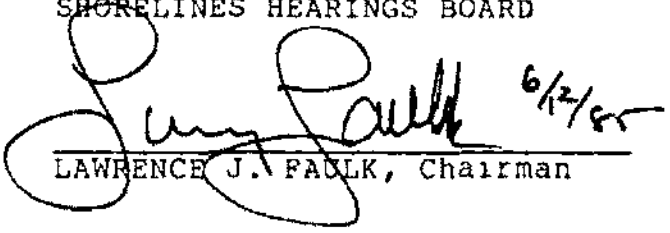
From these Conclusions the Board enters this


ORDER


The instant substantial development and conditional use permits issued by Yakima County are affirmed while the variance permit is denied.

DATED this 14th day of June, 1985.

SHORELINES HEARINGS BOARD

 6/12/85
LAWRENCE J. FAULK, Chairman


GAYLE ROTHROCK, Vice Chairman


WICK DUFFORD, Lawyer Member


RODNEY M. KERSLAKE, Member


NANCY R. BURNETT, Member